Supreme Court, U.S.
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No. 09-538

IN THE

Supreme Court of the United States

CONSUMERS' CHECKBOOK, CENTER FOR THE STUDY OF SERVICES,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, SECRETARY OF HEALTH & HUMAN SERVICES, ACTING ADMINISTRATOR OF THE CENTERS FOR MEDICARE & MEDICAID SERVICES, AND AMERICAN MEDICAL ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT AMERICAN MEDICAL ASSOCIATION IN OPPOSITION

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QUESTION PRESENTED

Did the United States Department of Health and Human Services (HHS) properly withhold records requested by petitioner under the Freedom of Information Act, 5 U.S.C. § 552, where the records would reveal the amount of income received by individually identified physicians for treating Medicare patients, and where HHS was enjoined from releasing the requested records?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6, the American Medical Association states that it has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF OF RESPONDENT AMERICAN MEDICAL ASSOCIATION IN OPPOSITION

The American Medical Association ("AMA") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Consumers' Checkbook, Center for the Study of Services ("Checkbook").

COUNTERSTATEMENT OF THE CASE

Checkbook has sought records of HHS that, when juxtaposed with readily available public data, reveal the personal financial information of individually identified physicians treating Medicare patients. *See* App. 6a. Two courts of appeals have now held, on independent grounds, that those records are not subject to disclosure. In the case below, the D.C. Circuit held that the records are exempt from disclosure requirements under FOIA because disclosure would constitute a clearly unwarranted invasion of physicians' privacy. App. 17a; *see also* 5 U.S.C. § 552(b)(6). Contrary to Checkbook's argument, that court did not hold that "[t]he public interest in monitoring agency performance is ... limited to circumstances in which the agency is pursuing a highly specific statutory function." Pet. 13. Rather, the court considered what "operations or activities" of HHS the requested records could reveal, App. 7a (internal quotation marks and emphasis omitted), and concluded as a factual matter that those records would not "shed any additional light" on HHS's "'performance in maintaining and enhancing the quality and efficiency of services provided under the Medicare program'" or on "'the agency's ability to

root out Medicare fraud and waste.'" *Id.* at 7a, 11a; *see generally id.* at 7a-16a.

Subsequently, the Eleventh Circuit held that disclosure of substantially identical Medicare records was barred by an injunction entered by the District Court for the Middle District of Florida in 1979. *Alley v. U.S. Dep't of Health & Human Servs.*, 590 F.3d 1195, 1210 (11th Cir. 2009). The Eleventh Circuit did not consider the application of Exemption 6 to the requested records. *Id.* at 1201 n.9.[1] The D.C. Circuit, for its part, declined to reach the effect of the injunction on Checkbook's request for records. App. 4a n.3. However, both courts concluded that HHS acted properly in withholding the records.

The decision below is an application of well-settled law to the facts before the court. That opinion does not conflict with any holding of this Court or of any court of appeals. Moreover, the result in the D.C. Circuit accords with the result in the Eleventh Circuit—even though the cases were decided on different grounds. There is nothing in the decision below that warrants this Court's review.

I. PROCEEDINGS IN THE DISTRICT COURT

This litigation began when Checkbook claimed under FOIA, 5 U.S.C. § 552, that HHS had improperly withheld from disclosure certain Medicare claims records. App. 2a-3a. These records indicate the total number of each specific procedure performed for Medicare patients by individually identified physicians in four states and the District of Columbia. *Id.* When combined with publicly available fee schedules, the records would reveal "the total payments Medi-

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[1] The decision in *Alley* is not before this Court.

care made to any individually identified physician for claims submitted in 2004." *Id.* at 3a.

HHS argued in the district court that it was not required under FOIA to disclose the records for two separate and independent reasons. First, FOIA Exemption 6, 5 U.S.C. § 552(b)(6), permits the agency to withhold the records in order to preserve physicians' personal privacy. App. 3a. Second, the injunction entered in *Florida Medical Ass'n v. HEW*, 479 F. Supp. 1291 (M.D. Fla. 1979) ("*FMA*"), bars disclosure of the records. App. 3a. More specifically, the *FMA* order provides that any "disclosure of annual Medicare reimbursement amounts, for any years, in a manner that would personally and individually identify the providers of services under the Medicare program who are members of the recertified class in this case is declared to be contrary to federal law." JA296; *see also Alley*, 590 F.3d at 1201. It permanently enjoins such disclosure. JA296.

HHS asserted that the records sought by Checkbook were covered by the *FMA* injunction because they would disclose annual Medicare reimbursement amounts in a manner that would personally identify physicians who were members of the recertified class in *FMA* (which included all AMA members, all Florida physicians, and all members of the Florida Medical Association) and who treated Medicare patients. Rejecting both of HHS's arguments, the district court granted summary judgment to Checkbook. It ordered HHS to disclose the requested records. App. 55a.

II. PROCEEDINGS IN THE COURT OF APPEALS

The AMA was a plaintiff in the *FMA* litigation, and its members' privacy interests are directly at stake

here. The AMA was thus permitted to intervene in the D.C. Circuit. *See* App. 1a.

Expressly declining to reach the effect of the *FMA* injunction, App. 4a n.3, the D.C. Circuit held that FOIA Exemption 6 applied and upheld the decision of HHS not to disclose the records. The court first recognized, in accord with longstanding precedent, that physicians have a substantial privacy interest in their financial information. *Id.* at 5a-7a. The court explained that a substantial privacy interest exists even though the requested records would "not reveal completely an individual's personal finances," and even though "the payments relate to business activities and not personal finances." *Id.* at 6a (citing *Multi AG Media v. Dep't of Agric.*, 515 F.3d 1224, 1228-29 (D.C. Cir. 2008); *Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988)).

The court next concluded that no public interest in disclosure outweighed that privacy interest. Applying precedent of this Court, it noted that, "[t]he only relevant public interest in disclosure 'is the extent to which disclosure would serve the "core purpose of the FOIA," which is "contribut[ing] significantly to public understanding *of the operations or activities of the government.*"'" App. 7a (emphasis and second alteration in original) (citing *U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 495 (1994)).

It examined whether the requested records would serve the public interest by revealing information about "'HHS's performance in maintaining and enhancing the quality and efficiency of services provided under the Medicare program.'" App. 7a. The court found, as a factual matter, that Checkbook had failed to identify how the records could be used to evaluate HHS's performance in that regard. *Id.* at 9a-11a.

The D.C. Circuit went on to state that "[e]ven if the requested data could be used to measure the quality of care provided by Medicare-enrolled physicians," it would still not provide information as to *HHS's* performance. App. 11a. As the court explained, "[w]hile [HHS] has certain responsibilities to promote quality healthcare for Medicare beneficiaries," federal law prevents the agency from "'exercis[ing] any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the selection, tenure, or compensation of any officer or employee of any institution, agency, or person providing health services.'" *Id.* at 8a (citing 42 U.S.C. § 1395). And the requested records provide no information as to any other activity actually undertaken by HHS to promote physician quality. *Id.* at 11a-12a.

The D.C. Circuit next considered whether the requested records would "serve the public interest by revealing fraudulent Medicare claims made by physicians." App. 12a. On this point, the court found that Checkbook had "not provided any evidence of alleged fraud the requested data would reveal." *Id.* Likewise, although Checkbook argued "that the requested data will shed light on whether HHS is complying with its own transparency initiatives," the court concluded that the requested records would not "assist the public" in making that determination. *Id.* at 14a-15a. In sum, because the data Checkbook seeks would not help the public to evaluate HHS's operations or activities, "the requested data does not serve any FOIA-related public interest in disclosure." *Id.* at 16a.

Concurring in part and dissenting in part, Judge Rogers disagreed with the majority's balancing of the public and private interests under FOIA Exempt-

ion 6. App. 21a-30a. She agreed, however, that affirmance of the district court's order was inappropriate. Instead, she found that the case should be remanded for further proceedings to determine whether disclosure was barred under the *FMA* injunction. *Id.* at 34a-35a. The D.C. Circuit denied Checkbook's request for *en banc* rehearing over the dissent of three judges. *Id.* at 59a-60a.

III. THE ELEVENTH CIRCUIT'S DECISION IN *ALLEY*

Although the D.C. Circuit declined to reach the effect of the *FMA* injunction on Checkbook's FOIA request, the Eleventh Circuit subsequently decided in *Alley* that that injunction barred HHS from disclosing materially identical records. 590 F.3d 1195. As that court explained, "[t]he language of the *FMA* injunction is broad. It permanently enjoins disclosure of 'any list' of annual Medicare reimbursement amounts, 'for any years,' if disclosing it would identify members of the recertified class." *Id.* at 1207. Thus, "[b]ecause the *FMA* injunction, reasonably construed, covers the subject matter of Alley's FOIA request, we conclude that HHS did not 'improperly' withhold those records under the FOIA." *Id.* at 1210 (citing *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 385-87 (1980)).

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW ACCORDS WITH PRECEDENT AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANOTHER COURT OF APPEALS.

The panel's decision in this case was a reasoned application of well-settled precedent to the relevant facts. Each step of the majority's analysis conformed

to principles previously set forth by this Court, the D.C. Circuit, and other courts of appeals. There is, therefore, no reason for this Court to grant the petition.

A. The D.C. Circuit Did Not Impose Any Novel Requirement For The Establishment Of A Public Interest Under FOIA.

Petitioner asserts that the D.C. Circuit held "that information requested under FOIA must relate to a specific statutory agency duty in order to establish a public interest cognizable under Exemption 6." Pet. 13. This assertion distorts the D.C. Circuit's opinion. Nothing in that opinion imposes any novel requirement for disclosure under FOIA.

Because the requested records implicate physicians' personal privacy, the D.C. Circuit was obligated to weigh that privacy interest against "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 497 (1994) (alteration in original) (quoting *U.S. Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 773 (1989)). Contrary to petitioner's argument, the D.C. Circuit did not find that a public interest in disclosure exists only as to "circumstances in which the agency is pursuing a highly specific statutory function, as opposed to carrying out its broader mandates." Pet. 13. The court instead ruled that even though there may exist a public interest in disclosure of information that would broadly "shed light on HHS's performance of its mission to promote quality healthcare for Medicare beneficiaries," App. 9a, or "reveal[] fraudulent Medicare claims made by physicians," *id.* at 12a, the specific data that petitioner requested

would not, as a factual matter, "assist the public" in evaluating the agency's conduct, *id.* at 15a.

1. To begin, the D.C. Circuit assumed a public interest in learning about HHS's performance of its overall "mission to promote quality healthcare for Medicare beneficiaries." App. 9a. The court then went on to consider as a factual matter whether the requested records would actually shed light on that performance. Closely examining the specific information included in the records sought by Checkbook, the court concluded that they would not.

As the court recognized, Checkbook's position "rests on the assumption that the frequency with which a physician performs a medical procedure indicates the quality of the procedure." App. 9a. The court noted that there is an ongoing debate in the medical community as to whether the evidence supports that premise. *See id.* (citing conflicting academic literature). But even if quantity of procedures offers some informative value, quantity alone—which is all the requested records offer—is not a useful indicator. *See, e.g.*, Paul Tang et al., *Comparison of Methodologies for Calculating Quality Measures Based on Administrative Data Versus Clinical Data from an Electronic Health Record System: Implications for Performance Measures*, 14 J. Am. Med. Infomatics Assoc. 10, 10-11 (2007) ("To be useful, a quality measure should be precisely defined, tied causally to an outcome, and affected by processes that the providers and/or the patients control.... Relying on administrative data from billing systems to deduce clinical context violates this principle and often produces misleading results that may lead to misinformed policymaking."); Kathryn Phillips & Harold Luft, *The Policy Implications of Using Hospital and Physician Volumes as "Indicators" of*

Quality of Care in a Changing Health Care Environment, 9 Int'l J. for Quality in Health Care 341, 345 (1997).

Even assuming, however, that meaningful information can be derived from the bare number of procedures that a physician performs, the informational value of the records Checkbook seeks is yet more attenuated. As the D.C. Circuit recognized, "the data [Checkbook] requests will not indicate total volume because it does not include procedures performed by physicians for non-Medicare patients." App. 10a. Medicare, although large, is still only one of many health insurers. Medicare claims data would not reveal enough about most physicians' practices to gauge accurately which physicians perform the greatest number of procedures. Moreover, the requested data includes only fee-for-service claims submitted to Medicare. It does not cover services provided under Medicare Advantage, the managed care option for Medicare beneficiaries. *See* JA16-18; *Medicare Utilization—Standard Analytic Files (SAFs)*, *available at* http://aspe.hhs.gov/hsp/06/Catalog-AI-AN-NA/MU-SAFs.htm.

The court also rejected Checkbook's claim—reiterated here—that disclosure of the requested records would demonstrate "the extent to which physicians are providing all services required to reach standards of recommended care." Pet. 24. As the D.C. Circuit found, Checkbook has never been able to "explain how the requested data can be used to perform this analysis." App. 11a. Without patient-identifying information, which Checkbook does not seek, the requested data will not permit Checkbook to determine which procedures physicians performed for which patients.

In sum, the D.C. Circuit rejected Checkbook's assertion that the requested records would permit the public to determine whether Medicare was properly promoting physician quality—not because the court imposed some novel legal requirement, but because Checkbook failed to establish the required connection between the records and the asserted public interest. As the court's factual analysis concluded, Checkbook offered "nothing [that] indicates that a physician who performs a procedure less often fails to meet recognized standards of health care." App. 12a. It is Checkbook's failure to carry its burden and not a novel interpretation of FOIA that underlies the court's holding that the requested records would shed no light on HHS's performance of any obligation—statutory or otherwise—to promote physician quality.

2. After having found that the records at issue would not reveal whether HHS was promoting physician quality, the D.C. Circuit went on to conclude that "[e]ven if," contrary to fact, "the requested data could be used to measure the quality of care provided by Medicare-enrolled physicians, it would not shed light on the 'agency's performance of its statutory duties.'" App. 11a (quoting *Reporters Comm.*, 489 U.S. at 773). This conclusion, too, was not based on a novel rule of law, but on the fact that the agency plays no role in selecting which physicians will treat Medicare beneficiaries. *Id.* at 8a-9a. Indeed, the agency is statutorily barred from "exercis[ing] any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the selection, tenure, or compensation of any ... person providing health services." 42 U.S.C. § 1395; *see also* App. 8a.

This fact belies petitioner's claim that the requested records would shed light on *HHS's* actions

by permitting the public "to tabulate the number of times that Medicare-enrolled physicians have performed particular procedures." Pet. 23. Even if, as petitioner asserts, such a bare tabulation of the number of procedures performed by a physician for Medicare beneficiaries would demonstrate something about the quality of care provided by that physician, it would show nothing about HHS's performance because the agency does not and may not play any role in the selection of which Medicare-enrolled physician will treat a Medicare beneficiary. Thus, records indicating whether *Medicare beneficiaries* choose to be treated by more or less experienced physicians reveal nothing about "'the operations or activities of *the government*.'" *FLRA*, 510 U.S. at 495 (emphasis omitted and added) (quoting *Reporters Comm.*, 489 U.S. at 775); *see also* App. 7a.

This essential fact likewise distinguishes this case from the two opinions of this Court cited by petitioner for the proposition that FOIA disclosure extends beyond an agency's performance of "statutory dut[ies]." Pet. 17-18. Regardless of whether the agency is performing a duty imposed by statute, these cases make clear that disclosure is required under FOIA only where it is the *agency* that is acting. In *United States Department of State v. Ray*, 502 U.S. 164 (1991), this Court found that the FOIA claimant was entitled to disclosure of materials that would be informative as to "*the State Department's performance* of its duty to monitor Haitian compliance with the promise not to prosecute the returnees." *Id.* at 178 (emphasis added). In *National Archives & Records Administration v. Favish*, this Court found that petitioner had stated a claim under FOIA as to information that would help to "uncover[] deficiencies

or misfeasance in the *Government's investigations*." 541 U.S. 157, 173 (2004) (emphasis added).

The court below made this point in distinguishing the third case cited by petitioner (Pet. 18), *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224 (D.C. Cir. 2008). *See* App. 13a-14a. In *Multi AG Media*, the D.C. Circuit ordered disclosure of records identifying individuals who were selected by the U.S. Department of Agriculture to receive subsidies. *See* 515 F.3d at 1231. Although recipients of the USDA grants had a substantial privacy interest in their personal financial records, the court held that that interest was outweighed by the public interest in determining how recipients were selected by the agency. *Id.* at 1230-31.

As the court below explained, the public interest at issue in *Multi AG Media* is simply not presented by the Medicare records that petitioner seeks because, unlike USDA, HHS does not select the recipients of Medicare payments:

> The specific public interest in *Multi AG Media*, however, was enabling the public "to look at information the agency had before it when [determining whether a particular farm is eligible to participate in the benefit programs in the first place] so that the public can monitor whether the agency is correctly doing its job." *Id.* at 1231. In contrast, the Medicare claims data is irrelevant to whether physicians meet the Medicare enrollment requirements.

App. 14a (alteration in original). *See also Painting & Drywall Work Pres. Fund, Inc. v. HUD*, 936 F.2d 1300, 1303 (D.C. Cir. 1991) (finding no cognizable public interest in disclosure of names, addresses, and payroll records of construction workers employed by

contractors on HUD-funded projects because those records offered no relevant information as to what the agency—as opposed to the contractors—was "'up to'").

Thus, even if the requested records demonstrated the quality of individual physicians whom Medicare beneficiaries choose for treatment (which, for the reasons listed by the court below, App. 9a-12a, they do not), they would offer no information as to how *HHS* is performing.

B. The D.C. Circuit Did Not Hold That There Was No Public Interest In Monitoring Medicare Spending.

Petitioner next asserts that the D.C. Circuit split from "a large number of courts" by purportedly rejecting the view that "there is a compelling public interest in monitoring how the government spends money under federal programs." Pet. 26. Again, however, the assertion distorts the holding of the D.C. Circuit. To the contrary, that court noted its own recent decision that there exists a public interest in data that would "allow[] the public to 'more easily determine whether [an agency] is catching cheaters and lawfully administering its subsidy and benefit programs.'" App. 14a (quoting *Multi AG Media*, 515 F.3d at 1232).

In this case, however, the D.C. Circuit made a factual determination that the specific records Checkbook requested were "irrelevant" to any such inquiry, and that Checkbook "ha[d] not provided any evidence of alleged fraud *the requested data would reveal*." App. 12a (emphasis added), 14a. Similarly, in this Court, Checkbook asserts that "Medicare is rife with potential for waste, fraud, and abuse." Pet. 30. Significantly, however, it does not explain how the precise number of procedures performed by every

individually identified physician treating Medicare beneficiaries would reveal such potential "waste, fraud, and abuse." As the D.C. Circuit explained, "the Medicare claims data is irrelevant to whether physicians meet the Medicare enrollment requirements," App. 14a, and thus will not serve to indicate whether physicians not entitled to Medicare reimbursement have improperly received it.

C. The D.C. Circuit Correctly Found That Physicians Have A "Substantial" Privacy Interest In Their Personal Financial Information.

Finally, Checkbook asserts that physicians' privacy interest in the requested records does not "clearly outweigh[] the public interest in disclosure," as required under FOIA Exemption 6. Pet. 33 (emphasis omitted). The D.C. Circuit's determination of physicians' privacy interest in the requested records was, however, in accord with settled law.

The court initially held that if physicians have a substantial—*i.e.*, greater than *de minimis*—privacy interest in the requested records, then it would be obligated to "balance the privacy interest in non-disclosure against the public interest." App. 5a (citing *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989) ("*NARFE*")). That is precisely the analytical framework set forth by this Court. *See U.S. Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 762 (1989).

Here, as Judge Rogers agreed, there can be "little doubt that the disclosure of the requested material would implicate more than a *de minim[i]s* privacy interest." App. 20a (Rogers, J., concurring in part and dissenting in part). It is undisputed that the records that Checkbook seeks "would reveal the total

Medicare payments received by a physician for covered services." *Id.* at 6a. The D.C. Circuit and other federal courts of appeal have repeatedly held that such financial information implicates a substantial privacy interest.

In *Multi AG Media*, the D.C. Circuit explained that where business records—like those sought by Checkbook—"reveal financial information easily traceable to an *individual*, disclosing those records jeopardizes a personal privacy interest that Exemption 6 protects." 515 F.3d at 1228-29. The court thus held "that Exemption 6 applies to financial information in business records when the business is individually owned or closely held, and 'the records would necessarily reveal at least a portion of the owner's personal finances.'" *Id.* (quoting *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 685 (D.C. Cir. 1976)). That holding is consistent with numerous prior rulings finding a substantial privacy interest in financial information. *See, e.g.*, *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1189 (8th Cir. 2000) ("An overly technical distinction between individuals acting in a purely private capacity and those acting in an entrepreneurial capacity fails to serve the exemption's purpose of protecting the privacy of individuals."); *Lepelletier v. FDIC*, 164 F.3d 37, 47 (D.C. Cir. 1999); *Sheet Metal Workers Int'l Ass'n Local No. 9 v. U.S. Air Force*, 63 F.3d 994, 995, 997-98 (10th Cir. 1995); *Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of Air Force*, 26 F.3d 1479, 1484 (9th Cir. 1994); *Painting & Drywall Work Preservation Fund*, 936 F.2d at 1302-03; *Hopkins v. HUD*, 929 F.2d 81, 86-87 (2d Cir. 1991); *NARFE*, 879 F.2d at 875-76.

Indeed, the court below could well have gone further than it did in articulating physicians' privacy

interest in the requested records. First, it is noteworthy that AMA members treating Medicare beneficiaries for the past three decades have done so pursuant both to a court order and to an HHS pledge that the information in question would be kept confidential. *See FMA*, 479 F. Supp. at 1311 (permanently enjoining disclosure of physician-identifying Medicare reimbursement information); Freedom of Information; Modified Policy on Disclosure of Amounts Paid to Individual Physicians Under the Medicare Program, 45 Fed. Reg. 79,172, 79,172 (Nov. 28, 1980) ("The Secretary has considered the competing interests and has concluded that the public interest in the individually identified payment amounts is not sufficient to compel disclosure in view of the privacy interests of the physicians found compelling by the courts."). This Court has recognized the significance of such reliance interests to the Exemption 6 analysis. *See Ray*, 502 U.S. at 177 (finding that the Court of Appeals "gave insufficient weight to the fact that the interviews [the transcripts of which were subject to a FOIA request] had been conducted pursuant to an assurance of confidentiality").

Second, physicians who receive Medicare payments, unlike government employees or contractors, do not perform services for the government. They provide services for patients who are entitled to Medicare benefits. *See* 42 U.S.C. § 1395l(a) (Medicare benefits are paid when an "individual who is covered ... incurs expenses for services"); *id.* § 1395u(h)(1) (Medicare participating physicians "accept payment ... on an assignment-related basis for all items and services furnished to individuals"). The government, in other words, acts as the patients' insurer—not as the physicians' employer.

Finally, Checkbook's assertion that the requested records will not be revealing of physicians' "overall economic situation," Pet. 34, is simply inaccurate. Medicare payments compose, on average, some 25 percent of physicians' income. *See* GAO, Rep. No. GAO-05-119, *Medicare Physician Fees, Geographic Adjustment Indices Are Valid in Design, but Data and Methods Need Refinement* 4 (2005). However, in specialties that treat older patients primarily, the percentage of a physician's income from Medicare is significantly higher. Moreover, the percentage of physicians' income derived from Medicare is projected to increase dramatically in the next two decades as the average age of the population increases. *See* John K. Iglehart, *Medicare's Declining Payments to Physicians*, 346 New England J. Med. 1924, 1924 (2002). The records that Checkbook seeks thus will reveal an increasingly clear picture of physicians' overall financial situation in the coming years.

Physicians' privacy interest in the records sought by Checkbook is not, as Checkbook would have it, "quite limited." Pet. 33. To the contrary, that interest is substantial. *See* App. 6a-7a.

II. THERE IS AN INDEPENDENT GROUND FOR AFFIRMANCE NOT RAISED IN THE PETITION.

Quite apart from FOIA Exemption 6, the injunction entered against HHS in *FMA* remains in effect and bars the agency from disclosing the records sought by Checkbook. That injunction permanently enjoins HHS from disclosing "any list of annual Medicare reimbursements amounts, for any years, which would personally and individually identify ... providers of services." JA296 ¶ 2. It declares, moreover, that "[a]ny such disclosure of annual Medicare reimbursement amounts, for any years, in a manner that would

personally and individually identify the providers of services under the Medicare program" is "contrary to federal law." *Id.* The injunction therefore extends to the records requested by Checkbook, which would undisputedly "reveal the total Medicare payments received by a physician for covered services." App. 6a.

When an agency is subject to a lawfully entered injunction that requires the agency not to disclose particular records, that agency does not act "improperly" under FOIA by withholding the records in question. *See* 5 U.S.C. § 552(a)(4)(B) (district court may "order the production of any agency records *improperly withheld*") (emphasis added). This Court so held in *GTE Sylvania*:

> To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as "improperly" withholding documents under the Freedom of Information Act would do violence to the common understanding of the term "improperly" and would extend the Act well beyond the intent of Congress.

GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc., 445 U.S. 375, 387 (1980). Thus, pursuant to *GTE Sylvania*, HHS acted properly in withholding the requested records without regard to Exemption 6.

Although the D.C. Circuit majority elected not to reach this issue, App. 4a n.3, Judge Rogers did so. While disagreeing with the majority's Exemption 6 analysis, Judge Rogers found that the *FMA* injunction contains "broad language and its purpose to apply broadly is evident from the accompanying declaratory judgment and opinion." *Id.* at 33a. Because of the injunction's breadth, Judge Rogers

would have "remand[ed] the case to the district court for further proceedings on the scope of the injunction." *Id.* at 35a.

Subsequently, the Eleventh Circuit considered the effect of the *FMA* injunction in *Alley*, 590 F.3d 1195. Contrary to Checkbook's speculation, that court's ruling does not "conflict" with the opinion below. Pet. 15. Rather, it confirms that the records at issue are not subject to disclosure. As the *Alley* court explained:

> The language of the *FMA* injunction is broad. It permanently enjoins disclosure of "any list" of annual Medicare reimbursement amounts, "for any years," if disclosing it would identify [physicians in] the recertified class. The declaration paragraph of the injunction declares contrary to federal law "[a]ny such disclosure" of annual Medicare reimbursement amounts "in a manner that would personally and individually identify the providers of services." The repeated use of the word "any" makes clear that the scope of the injunction is not limited to the precise method of disclosure that was proposed in 1977.

590 F.3d at 1207 (footnote omitted); *id.* at 1201 n.9. Thus, "reasonably construed," the *FMA* injunction "covers the subject matter of" a FOIA request materially identical to Checkbook's, and "HHS did not 'improperly' withhold those records under the FOIA." *Id.* at 1210 (citing *GTE Sylvania*, 445 U.S. 375).

In short, the two federal appellate courts asked to decide whether HHS is required to disclose the records sought by petitioner have reached the same result, albeit for different reasons. Apart from the absence of any conflict in the Circuits, the decision of

the Eleventh Circuit strongly supports the conclusion that there is an independent ground for affirmance.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Brief in Opposition of Respondents U.S. Department of Health & Human Services, et al., this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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